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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 410

JACKSON BREWING COMPANY,
Petitioner,

v.

JACK D. CLARKE, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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STATEMENT

Because this petition seeks review of an entry made by a Federal District Court on his calendar sheet, (Tr. 57) there are no findings of fact, conclusions of law, or judgment from which the facts can be established. Furthermore, because the entry was a pre-trial order, there is no evidence to which to refer. Except where the parties in their pleadings agree, or where the United States Court of Appeals has made a statement of fact, the facts must be stated as allegations.

The Petitioner, the Jackson Brewing Company, had a distributorship contract with Respondent, an individual, for the area in and around Conroe, Texas (Tr. 4-6, 17).

The Petitioner cancelled that contract and awarded to a third party. (Tr. 18, 53). A dispute arose between the Petitioner, the Respondent and the new distributor as to the terms and conditions surrounding the termination of the contract. One item of controversy was whether $12,000 was still due the Petitioner. The Respondent filed suit in the state court (Tr. 8, 12, 14-16). Before even answering the Respondent's petition in the state court, the Petitioner filed an action in the Federal District Court (Tr. 58). In the words of the Court of Appeals, "the factual issue about which the litigation revolves is whether, at the time of termination, the [Petitioner] agreed with [the Respondent] to cancel the $12,000 indebtedness in partial consideration for [Petitioner's] transfer of the assets of the distributorship to the third party . . ." (Petition, p. 2a, 303 F. 2d 844). After the Respondent had secured a judgment in the state court against Petitioner, the Petitioner moved for a summary judgment in the Federal Court on the theory that, by taking the judgment against the Petitioner, the Respondent had elected to waive his claim as a defense to Petitioner's Federal Court action (Tr. 22a, 25-27). Respondent pleaded the state court judgment as being res judicata. (Tr. 42, 46). Since both parties were relying on the state court judgment, the Federal District Court postponed ruling on the motion for summary judgment until the judgment became final. (Tr. 57).

The Petitioner then unsuccessfully sought mandamus. (Petition, p. 3a). Following that, it sought an interlocutory appeal in the Court of Appeals. While the appeal was pending the state court judgment was reversed and remanded. *Jackson Brewing Co.* v. *Clarke*, 352 S.W. 2d 322 (writ refused, n.r.e.).

The Court of Appeals dismissed the appeal (303 F. 2d 844), and the Petitioner seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

(1) There is no final judgment in either the District Court or the Court of Appeals which disposes of all the issues between the parties. Ordinarily such interlocutory appeals lack sufficient significance to merit review in the Supreme Court. *American Const. Co.* v. *Jacksonville, T. & K. W. Ry.* 148 U.S. 372, 384; *Panama Railroad* v. *Napier*, 166 U.S. 280; *Denver* v. *New York Trust Co.*, 229 U.S. 123, 133. Since the ruling of the Court of Appeals will not affect the outcome of the litigation in the District Court, it is difficult to bring the instant case within an exception to the established rule. See, e.g., *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *Land* v. *Dollar*, 330 U.S. 731; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251.

(2) The basis of Petitioner's motion for summary judgment in the Federal District Court was a theory based upon a judgment granted in a state court. That state court judgment has been vacated and remanded by the Texas Court of Civil Appeals. Thus, the issue of whether the District Court should hear the Petitioner's motion for summary judgment based on that state judgment is now totally abstract and hypothetical. Accordingly, the issue is moot. *Tregea* v. *Board of Directors*, 164 U.S. 179; *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 616. See *Muskrat* v. *United States*, 219 U.S. 346.

(3) The Court of Appeals for the Fifth Circuit correctly held that the postponement of a ruling on a motion for summary judgment by the District Court did not constitute an "interlocutory order . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ." under 28 U.S.C.

§1292(a)(1). The Petitioner has taken it upon himself to characterize Respondent's theory in the Federal District Court as one of specific performance of a contract in order to invoke a fiction that the District Judge's calendar sheet entry was an injunction to restrain himself from considering an issue of law, *cf. Baltimore Contractors* v. *Bodinger*, 348 U.S. 176; *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254. The Court of Appeals correctly characterized the problem as follows: "The State action involved simply a legal claim for breach of contract, and it presented essentially the same legal issues as were raised by the pleadings in the federal action." (Petition, p. 4a) Therefore, "there is no basis for holding that the stay order issued by the District Court was equivalent to an injunction and, as such, appealable under §1292(a)(1)." (Petition, p. 4a) All the Petitioner really seeks is a review of the District Court and the Court of Appeals' characterization of the Respondent's theory of his cause of action.

(4) This case presents no conceivable problem involving the abstention doctrine. See *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25. Here the Federal District Court did not stay its own proceedings in order to allow a state court to proceed to judgment — the Federal Judge made his calendar sheet entry because it appeared that the state court had *already* entered judgment. See, e.g., *Pa. Gen. Cas. Co.* v. *Pa. ex rel Schnader*, 294 U.S. 189; *Kline* v. *Burke Constr. Co.*, 260 U.S. 226. Thus, the decision of the Court of Appeals dismissing the interlocutory appeal does not establish a doctrine limiting federal diversity jurisdiction.

(5) Any problems involving a conflict between the state and federal judiciary have been created by the Petitioner. First, the Respondent filed suit against the Petitioner and

the new distributor in the state court (Tr. 14). That court had jurisdiction over the controversy and over the parties, and was capable of resolving the dispute. Because citizens of Texas were on both sides of the controversy, the state court action was not removable. See, *Strawbridge* v. *Curtiss*, 3 Cranch 267; 28 U.S.C. §1441. The Petitioner, in an effort to circumvent the constitutional requirement of diversity of citizenship, carved out a portion of the controversy in the state court and filed suit in the Federal Court. In this circumstance, it is difficult to perceive how the Petitioner has been deprived of a constitutional right.

Second, the Petitioner has used the Federal Court as a shield to avoid litigating the whole controversy in the state court. Rule 97(a) of the Texas Rules of Civil Procedure, following Fed. R. Civ. P. 13, requires that a defendant file a counterclaim for any cause of action he may have arising ont of the same transaction or occurrence upon which the plaintiff's suit is based. Obviously, the contract in question is such a transaction or occurrence, and the Petitioner should be required to make his claim in the state court. However, the Texas Rule specifically excuses the filing of a compulsory counterclaim when that claim is the subject of a pending suit in another court. When the Petitioner was served with notice of the Respondent's suit in the state court, the Petitioner immediately filed his action in the Federal Court before answering in the state court. This ploy was admittedly intended to allow the Petitioner to circumvent the operation of the Texas Rules and brought about an unnecessary conflict between the state and federal courts (Tr. 58).

Furthermore, the resulting multiplicity of suits has operated to whipsaw the individual Respondent between the state and federal courts, causing him unnecessary costs and expenses.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be denied.

By .....
Attorneys for Respondent

CERTIFICATE OF SERVICE

This is to certify that on the .. day of October, 1962, a true and correct copy of this Brief in Opposition was served upon Mr. Cornelius O. Ryan, 666 Gulf Building, Houston 2, Texas, by placing the same in an envelope addressed to him, postage prepaid, by certified mail, and deposited in the United States mails.

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